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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 931

CARLOS MARCELLO, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES AND RAYMOND F. FARRELL, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Br. 15–22) is reported at 312 F. 2d 874.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1962. The petition for a writ of certiorari was filed on March 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly ordered the dismissal of a suit for declaratory and injunctive relief challenging the legality of a prior deportation on the grounds (1) that the request for injunctive relief had become moot and (2) that the request for declaratory relief involved issues which could be litigated in and were solely of relevance to pending criminal and deportation proceedings in another circuit.

STATEMENT

A final order of deportation was entered against petitioner on June 1, 1953 for violation of the Marihuana Tax Act. The validity of that order was upheld by this Court in 1955. *Marcello* v. *Bonds*, 349 U.S. 302. Thereafter, the execution of the deportation order was delayed by petitioner's repeated appeals to the courts, including a suit in the Civil Court of Rome, Italy, for a judgment declaring him not to be a citizen of Italy and to enjoin the Italian Government from issuing a travel document to him. The chronology and nature of this course of litigation is set forth in H. Rep. 565, 87th Cong., 1st Sess., pp. 7–11.[1]

[1] The Committee report indicates that the assertedly dilatory and repetitious litigation by petitioner and other deportees was a major reason for the subsequent enactment by Congress of Sec. 5 of the Act of Sept. 26, 1961, 75 Stat. 650, 651, providing a single, expeditious remedy for the review of deportation orders. See also H. Rep. 1086, 87th Cong., 1st Sess., pp. 22–30. Another comprehensive recital of the prolonged maneuvers by petitioner to defeat the deportation order against him appears at J.A. 201–228.

In the administrative proceedings, it was concluded that petitioner was a citizen of Italy. That conclusion was based on petitioner's testimony that he was born to Italian parents in Tunis, North Africa, on February 6, 1910. J.A. 15.[2] However, on February 14, 1961, the Italian Government furnished to the United States Immigration and Naturalization Service (INS) a photostatic copy of a birth record indicating that petitioner had been born in Palo Blanco, Guatemala, on February 6, 1910. In furnishing this document, the Italian Government informed INS that it had been transmitted to the Italian Foreign Ministry in Rome by the Italian Consul in New Orleans, Louisiana. *Id.*[3]

The actual existence of such a document was thereafter confirmed by visual inspection in Guatemala. *Id.* The certified record of birth apparently had been given to the Italian Consul in New Orleans by petitioner or by a person acting under his direction; no civil record of birth in Tunisia had been located; and there were other discrepancies in the account of the alleged birth in Tunisia. INS therefore concluded that there was reasonable basis for believing that Guatemala was the true place of petitioner's birth and that deportation to Guatemala would be proper. J.A. 15–16. A representative of INS thereupon conferred with the Chief of the Immigration Service of Guatemala, acquainting him with the foregoing facts and asking whether the Government of

[2] References are to the Joint Appendix in the court below, which has been lodged with this Court.

[3] A copy of this birth certificate, with a translation, appears at J.A. 94–96–B.

Guatemala would issue a travel document for petitioner and accept him as a deportee from the United States. J.A. 16, 19. The Immigration Chief of Guatemala replied affirmatively and issued a travel document for petitioner on March 15, 1961. J.A. 16, 20, 92–93.

Upon receipt of the travel document, INS decided to deport petitioner to Guatemala. It was advised by its General Counsel that, contrary to petitioner's contentions, deportation was not inhibited by any judicial or administrative restraint or by any agreement.[4] J.A. 17. On April 4, 1961, petitioner was taken into custody under the order of deportation and he was deported that day to Guatemala. J.A. 21–24, 56.

The following day, this suit for a declaratory judgment and an injunction was commenced by petitioner in the United States District Court for the District of Columbia. J.A. 1, 4. Petitioner's complaint

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[4] Petitioner now contends that the government had stipulated that he would not be deported without three days' notice. The document to which petitioner apparently refers was filed in the Supreme Court on October 10, 1955, and states in full:

"It is hereby stipulated by and between counsel for the respective parties herein, that the petitioner will be released upon administrative bail in the amount of $10,000, conditioned for his delivery into custody for deportation upon three days' notice, that such bond will be substituted for the judicial bond previously executed herein and that, in view of the foregoing, counsel herein consent to the vacating of the Order of Mr. Justice Black dated September 16, 1955." (J.A. 71.)

The provision for three days' notice was plainly a condition for forfeiture of the $10,000 bond and nothing else. Moreover, the administrative bail bond was cancelled on April 26, 1956, and the stipulation thereupon lapsed. Upon the expiration of six months from the final deportation order INS had lost its authority to require further administrative bail. *Shrode* v. *Rosoldt*, 213 F. 2d 810 (C.A. 8).

attacked the legality of his deportation to Guatemala, contending that respondents and their agents had made false representations to Guatemala, had denied him advance notice and the assistance of counsel, and had violated his constitutional rights. J.A. 4–6. Simultaneously, petitioner moved for a preliminary and permanent injunction to require respondents to return him to the United States and to restrain them from enforcing the deportation statute against him. J.A. 9.

A three-judge court found the statute constitutional and then remanded the remaining issues in the case to the district judge for further appropriate action. J.A. 26–27, 194 F. Supp. 748 (D.C.). Cross motions for summary judgment were made and, on May 24, 1961, Judge Alexander Holtzoff ordered that summary judgment be granted in favor of respondents and that the action be dismissed. J.A. 49–50. A motion for reconsideration was denied on June 5, 1961. J.A. 50. On June 9, 1961, petitioner moved to vacate the summary judgment, asserting that he had returned to the United States following his expulsion from Guatemala, had surrendered to INS on June 5, 1961, and had been served with an order to show cause and notice of hearing in deportation proceedings. J.A. 50–51.[5] It also appears that a

[5] Following the illegal reentry, a new deportation order was entered against petitioner, which became final December 20, 1961. This new order, predicated on Sec. 242(f) of the Immigration and Nationality Act, 8 U.S.C. 1252(f), merely reinstated the previous order of deportation, which had been upheld by this Court. Petitioner has not sought judicial review of the 1961 order. Since more than 6 months has elapsed, his only judicial review would be by habeas corpus. See Sec. 106, Immigration and Nationality Act, as amended, 8 U.S.C. 1105a.

criminal prosecution under 8 U.S.C. 1326, predicated on the unlawful reentry, is pending against petitioner. J.A. 82.[6] On June 20, 1961, the motion to vacate the summary judgment was denied. J.A. 57.

Petitioner appealed from the orders granting summary judgment, denying reconsideration, and denying the motion to vacate. J.A. 63. On December 20, 1962, the United States Court of Appeals for the District of Columbia found that the district court should have dismissed the complaint in the exercise of its informed discretion. It ruled that, since petitioner had returned to the United States, the cause had become in large part moot, and that, while some aspects of the complaint still presented a live controversy, those issues could more appropriately be settled in the pending criminal prosecution for unlawful reentry following deportation. The judgment and orders on appeal were vacated and the case was remanded to the district court with directions to dismiss the complaint. Circuit Judge Wilbur K. Miller dissented, declaring his belief that the district court had properly entertained the action and had correctly ruled against petitioner on the merits.

ARGUMENT

The decision of the court below, which grants petitioner the very disposition of this case which he re-

[6] In addition to the unlawful reentry charge under 8 U.S.C. 1326, petitioner has been charged with violating the conspiracy and perjury statutes, 18 U.S.C. 371 and 1621. These charges relate to the alleged procurement of a forged Guatemalan birth certificate (Crim. Nos. 28365 and 28366, United States District Court, Eastern District of Louisiana).

quested of the district court, involves no issue of broad or continuing importance such as would justify review by this Court. The decision, indeed, does not substantially affect the rights of the particular petitioner now before the Court.

1. Petitioner's complaint requested a declaration that his deportation to Guatemala was unlawful and an injunction ordering that he be permitted to return to the United States. On petitioner's return to the United States, the request for injunctive relief plainly became moot. Petitioner's request for declaratory relief retained practical importance only to the extent that a determination that he had been illegally deported might affect a pending criminal prosecution in the Fifth Circuit for illegal reentry or pending deportation proceedings based upon illegal reentry after deportation.

The decision of the district court was that petitioner had been legally deported to Guatemala. The only available dispositions of the case in the court of appeals were to affirm, to vacate as petitioner had originally requested, or to reverse the summary judgment and remand for trial of the disputed issues of fact. The court of appeals concluded, entirely reasonably, that the district court's declaratory judgment should neither be affirmed—thus casting serious doubts upon the proper course of the pending prosecution and deportation proceedings—nor reversed for trial in the district court of an issue which had practical importance only as it related to pending proceedings in another circuit where, if the issue is held to be relevant, it can still be fully and

fairly litigated.[7] The court of appeals therefore decided that the judgment of the district court, which was adverse to the petitioner, should be vacated as petitioner had requested.

This disposition by the court of appeals falls well within the traditionally broad scope of a federal court's equitable discretion in denying declaratory relief. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 300; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431. The court here was influenced by the uncertainty its declaratory judgment would produce in other proceedings where the issues could more appropriately be tried. See *Rescue Army* v. *Municipal Court*, 331 U.S. 549; *Public Service Commission* v. *Wycoff Co., Inc.*, 344 U.S. 237, 243. It also realized that its decision in the declaratory judgment suit might not preclude petitioner from raising the same contentions in defending the criminal prosecution for unlawful reentry after deportation. In that event, its declaratory judgment would be only advisory and would not determine a case or controversy warranting the exercise of judicial power. See *Aetna Ins. Co.* v. *Haworth*, 300 U.S. 227. The discretionary refusal to grant declaratory relief in these circumstances was entirely proper. See 6 Moore, *Federal Practice* (2d ed.) 3032 *et seq.*

[7] In our view it is questionable whether petitioner can properly resist a prosecution for unlawful reentry by contending that his deportation was invalid, thus bypassing other processes for adjudicating his grievance as well as the established mechanism for the control of entries into the United States. If this issue is not relevant to the pending prosecution, it is all the more clear that the district court's declaratory judgment was properly vacated.

The court, we emphasize, did not foreclose the presentation of any allowable challenges to the deportation, but concluded only that they should await disposition in a more appropriate forum in pending proceedings. The review petitioner can obtain in those proceedings is at least equivalent to that available in this declaratory judgment suit. The court below, far from deciding an important issue of federal practice, as petitioner contends, exercised an informed discretion in a situation which is unmistakably unique.

2. There may be some question as to the occasions on which it is proper for a three-judge district court, which has denied a plaintiff's constitutional claim for injunctive relief against the enforcement of a federal statute, to remit to a single district judge the decision of other issues or of claims for other than injunctive relief. See *Public Service Comm. of Missouri* v. *Brashear Freight Lines*, 312 U.S. 621, 625. But there is no need in the present case to undertake further consideration of this question, which appears to have arisen extremely infrequently in the federal courts. At the time petitioner initiated this suit, which was prior to his return to the United States, he could in no way be affected by any threatened application against him of the provisions of 8 U.S.C. 1253(a)(7) and therefore the relief available to petitioner could not include an injunction "restraining the enforcement, operation of execution" of that statute. Accordingly, a three-judge court was not required by 28 U.S.C. 2282. Subsequent to petitioner's reentry the government has neither threatened nor

attempted to deport petitioner again to Guatemala. Therefore, no justiciable controversy as to the constitutionality of a proposed enforcement of the federal statute has existed at any time during this litigation.

It would, in any event, be inappropriate to undertake review of the necessity for a three-judge court in the present case. It is plain that, even if a three-judge court were impaneled, it would properly and at once dismiss the complaint for declaratory relief so that all substantive issues could be determined in another circuit in the course of the criminal or *habeas corpus* proceedings to which these issues are alone relevant, if they are, in fact, of practical importance at all.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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